In The

Supreme Court of the United States

October Term, 1979

No. 79-1740

GERMAIN H. BALL, et al.,

Appellants

vs.

ROLAND W. JAMES, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

JON L. KYL
NEIL VINCENT WAKE
JENNINGS, STROUSS & SALMON
111 West Monroe Street
Phoenix, Arizona 85003
Tel. (602) 262-5881

REX E. LEE
2840 Iroquois Dr.
Provo, Utah 84601

Attorneys for Appellants

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Appellees' Motion to Affirm, rather than showing the questions presented to be unsubstantial, makes even clearer the novelty of the lower court's decision and its great practical significance to the owners of 236,000 acres of water-dependent land in the District. Appellees do not dispute that this decision destroys Arizona's historic water policy (reiterated most recently by the legislature in 1976, after this case was decided in the trial court) of inducing collective water reclamation efforts supported by proprietary sales of electricity. This disruption of state reclamation policy, as well as the massive forfeiture of agricultural property values which will be worked by the Court of Appeals' decision, make it imperative that the ultimate judgment on the constitutionality of this state statute should rest with this

Court, rather than upon the precarious decision of only two of the four lower federal judges who have passed on this case so far.

The Appellees rely on three differences between this case and *Salyer:* (1) the Salt River Project is larger; (2) the water owners it now serves are not all farmers; (3) it sells electricity. None of these has any relevance to the *Salyer* dividing line between those governmental units that exercise general governmental authority and those whose stewardship is limited. Neither the size of the District nor the number of waterusers has anything to do with the specialty or generality of function; and neither does the sale of electricity as a means of subsidizing water conservation and reclamation.

Even if the Project were engaged in two independent enterprises, water and electricity, it would not be a general governmental unit.[1] But that is not this case. The stipulated fact—the controlling fact—is that the sale of electricity was undertaken, not for its own sake, but for the primary purpose of reducing cost of water delivery. The Appellees would recant this stipulation—arguing that while Paragraph 17 of the Facts identifies the primary water purpose of the Salt River Reclamation Project and the Salt River Valley Water Users' Association, it does not refer to the District. (Motion to Affirm, p. 3 n. 2). The paragraph of the Facts specifically identifying the identical primary purpose of the District is paragraph 34:

> The District was organized for the purpose of continuing the operations of the Association, the principal objective of which was to provide water for use within the geographic boundaries the Association and District

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[1] *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973); *cf. Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

> .... The primary legislative purpose of the District is to provide water to District lands. (Facts ¶34, App. C-14.)[2]

Once the focus shifts from the Project's acknowledged size and location to what it does, it is apparent that this is a *Salyer* case. *Salyer* held that it is the district's primary purpose which controls. In *Salyer*, the district engaged in more than one function. Indeed, the principal complaint in the case was that the *Salyer* district should not have subordinated its flood control activities to its water delivery activities. The controlling fact, nevertheless, was that "its primary purpose, indeed the reason for its existence, is to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin." 410 U.S. at 728. The same is true here. The District's "primary purpose, indeed the reason for its existence", is, as in *Salyer*, conservation, storage, and distribution of water. The sale of electricity is adjunct to it.

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[2] In an attempt to find some support for their argument that water and power activities of the District are unrelated, the Appellees argue that Ariz. Rev. Stat. Ann. §45-903A6 (1956) gives the District the legal authority to undertake power activities independent of financial support to primary water activities. (Motion to Affirm, p. 3 and p. 7 n. 7).

Having stipulated that the District's power activities are *in fact* undertaken to provide financial support to its water activities, however, Appellees cannot and do not contend that the District actually sells power under subsection A6 of the statute. The only case interpreting the District's power activities states, as does ¶34 of the Stipulated Facts, that it is under §45-903A7 that this District sells power—the statutory subsection authorizing power sales to reduce the cost of water delivery "to the owners of the lands." *See Uhlmann v. Wren*, 97 Ariz. 366, 401 P.2d 113 (1965).

The disproportionate effect on landowners is equally apparent. It is difficult to conceive how any district could affect any group more disproportionately than the Salt River Project affects landowners. Ironically, the disproportionate effect upon landowners is the very reason the Appellees brought this lawsuit in the first place.

The Motion to Affirm refers to entities which are "... created with all the attributes of sovereignity and act in a manner which vitally and significantly affect people's lives ...." (Motion to Affirm, p. 12). The implication that this District has "all the attributes of sovereignity" is nothing less than astounding. What attributes of sovereignity? The fact that it sells electricity? The fact that it sells it to many people, some of whom live in cities? The district has no general taxing power; it has no power to enact rules governing people's conduct or to impose punishments; it has no authority over streets, fire and police protection, schools and hospitals. Out of the spectrum of prerogatives that constitute "all the attributes of sovereignity", the District has only a very narrow slice taken from the same part of the spectrum that can be exercised by either municipal or private entities. Its purpose for being is water conservation and, even as to water, it does not own, sell, or treat water.[3]

Equally significant is the assertion that the District's activities "vitally and significantly affect people's lives ...." (Motion to Affirm, p. 12). Of course they do, in exactly the same way that Arizona Public Service or any other electric utility affects people's lives.

This characterization of importance epitomizes the approach taken by the Appellees and the Court of Appeals: if the customers become numerous enough, then the customers are entitled to control. This is at direct odds with

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[3] Appellees again refuse to acknowledge the fact that the District's water function is nothing more than delivery of untreated water to landowners who own the water. For example, compare Motion to Affirm p. 12 with Facts ¶¶40, 41, 75; App. C-17-18, 31.

Salyer, whose basic principle is that as long as a district's authority is limited in scope,[4] choice of systems of control will be left to the judgment of the legislature, as long as the judgment is reasonable.

This is one of those rare cases in which Appellants are entitled to review as a matter of right.[5] In any event, the issues are clearly substantial, and jurisdiction should be noted.

Respectfully submitted,

JON L. KYL
NEIL VINCENT WAKE
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Tel. (602) 262-5881

REX E. LEE
2840 Iroquois Dr.
Provo, Utah 84601

Attorneys for Appellants

June 12, 1980

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[4] The reason for the decision in *Cipriano v. City of Houma*, 395 U.S. 710 (1969), was not that the city of Houma sold electricity. It was that Houma is a city, possessing all the "attributes of sovereignity".

[5] See Jurisdictional Statement p. 16 n. 8.